JOO CHIN KIA

v.

LOH SENG TEK

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL APPEAL NO. 5 OF 1982]
4 OCTOBER 1986

TORT: *Claim for damages - Dismissed by learned President - Appeal - Cause of accident - Parties bound by pleadings - Plea of res ipsa loquitor.*

This was an appeal by the plaintiff against the decision of the President of the Sessions Court dismissing his claim for damages arising from a car accident.

The plaintiff was a front seat passenger of a car driven by the defendant and with a third man seated in the rear. They were heading from Keratong 4 to look for one Nasir in Muar. The car was going uphill and negotiating a sharp left-hand bend when they saw ahead an unfenced wooden bridge. The car then veered left and fell into the river. The plaintiff sustained severe injuries to his left eye which left him blind in that eye.

In his statement of claim, the plaintiff pleaded that the accident was due to the defendant's negligence and also added a plea of *res ipsa loquitor.* In his defence, the defendant pleaded that he was totally reliant upon the plaintiff's knowledge of the route and the plaintiff's failure to forewarn him of the bridge was the cause of the accident.

At the trial before the learned President, the 3rd man and the defendant gave evidence that the only reason for the accident was that the plaintiff panicked and pulled the steering wheel down causing the car to veer left and go over the bridge into the river. The learned President found as a fact that the pulling of the steering wheel was the cause of the accident and dismissed the plaintiff's claim. The plaintiff appealed.

Held:

[1] The learned President appeared to have placed undue reliance upon the demeanour of the defendant and the 3rd man and did not address his mind to the fact that the 3rd man said nothing about the accident being caused by the plaintiff in his police report and also the total omission of the defendant to state this fact in his defence.

[2] The alleged interference with the steering wheel was the crux of the defence. When there is an omission to plead a fact which is the lynch-pin of the defence, and the matter is raised for the first time at the trial a presumption should be invoked that such evidence is inherently incredible unless the omission is satisfactorily explained. There was no such explanation here.

[3] Even if the evidence of interference was credible and properly admitted the presumption of *res ipsa loquitor* was not displaced. The learned President did not address his mind to this aspect of the case either.

[4] The decision of the learned President was set aside and the defendant was ordered to pay the plaintiff the sum of RM17,000 by way of general damages and the sum of RM5,752 by way of special damages both of which were agreed in the Court below.

[Appeal allowed with costs.]

Cases referred to:
Lau Piang Ngong v. Ang Koon Kau & Anor. [1984] 2 CLJ (Rep) 137
Waghorn v. George Wimpey & Co. Ltd. [1969] 1 WLR 1764

For the appellant/plaintiff - R.A. Kumar; M/s. Varughese & Co.
For the respondent/defendant - Tan Hock Kim; M/s. Tan & Tan

JUDGMENT

Mahadev Shankar J:

This is an appeal from the dismissal by the President of the Sessions Court of the plaintiff's claim for damages arising out of an accident to the car in which he was a front seat passenger. The car was driven by the defendant. The accident took place on 30 August 1978. In the car was a third man who was seated in the rear. All the occupants were friends.

The plaintiff filed this action in April 1980. The evidence was heard between August and November 1981. After the plaintiff closed his case the defence was allowed to call the other passenger first on the ground that he had terminal cancer. He died shortly afterwards. Written submissions were filed in December 1981. The Learned President dismissed the claim in February 1982. (There was a counter-claim with which I am not concerned). Notice of Appeal was filed a few days later. But the Learned President did not give his Grounds of Judgment until a lapse of 2 years and 4 months thereafter. It then took another fifteen months for the Appeal Record to reach the High Court. This explains why this appeal is being heard over six years after the action was originally filed.

The delay is inordinate. It does no credit to those concerned with the administration of justice in the Lower Courts. And it is a cause for serious concern that this state of affairs has become the rule rather than the exception and one may perhaps ask with some justification for how long it should be suffered to continue.

Be that as it may, in the instant case, the starting point is to remind ourselves that a Civil Appeal is by way of rehearing and the proper approach is to commence with a resume of the salient facts.

By 29 August 1978 the plaintiff, the defendant, and the third man had agreed between themselves to buy a lorry load of palm oil from one Nasir for RM5,000. To say that the deal was curious, is to be charitable indeed. The going price then for a lorry load of palm oil was RM20,000. And delivery was to be effected on 30 August 1978 at 5.00 a.m. at Skudai. Fearing that the goods would not materialise in such dubious circumstances the three friends paid Nasir only RM2,500 by 29 August 1978. The opportunity to pay the remainder never arrived because neither Nasir nor the palm oil made its appearance at the appointed hour. Realising that they had been swindled these three people decided to look for Nasir.

The defendant and the third man suggested that it was the plaintiff's idea to look for Nasir at Keratong 4. As neither the defendant nor the third man knew how to get there, the evidence is that the plaintiff offered to show the way. This he did, but on arrival there Nasir was not to be found. So it was decided that they should look for Nasir at Muar. There is some dispute as to who actually suggested this. What is not in dispute is that all three agreed to go to Muar. And out of the defendant's own mouth, evidence was given that he the defendant knew the way from Keratong 4 to Muar. So they set off on a laterite road for this destination. There is no evidence whatsoever that on this return journey the defendant was in any way under the control or the direction of the plaintiff as to how or along what route the car should be driven. Nor is there any evidence whatsoever that along the route taken by the defendant he was totally dependant upon the plaintiff's knowledge of local conditions.

At about 3.30 p.m. the car was going up-hill and negotiating a sharp left-hand bend. No sooner had it got round the corner an unfenced wooden bridge was seen ahead. This bridge the car did not manage to cross. Either just before or just after the car got onto the bridge it veered off to its left and fell into the river. The plaintiff sustained severe injuries in the vicinity of his left eye which subsequently left him blind in that eye. The defendant was unconscious and but for the efforts of the plaintiff in resuscitating him may well have drowned. Apart from a bad fright and some complaint of giddiness, it seems that the third man was none the worse for wear.

The crux of the case was why this accident occurred. The plaintiff's claim was that it was the result of the defendant's negligence. The usual particulars which are pleaded in running down actions have been comprehensively set out in the Statement of Claim together with a plea of *res ipsa loquitor*. These include the failure to keep any proper look-out, or to have proper control of the car, excessive speed, failure to apply brakes, or take evasive measure, and so on.

The defendant was legally represented at all material times. In his statement of defence it was pleaded that the defendant was totally reliant upon the plaintiff's knowledge of the route along which the defendant was driving at the time the accident occurred. In so many words it was averred:

> When travelling along the said road the plaintiff failed to warn or indicate to the defendant the presence of a bridge mentioned in para. 3 of the statement of claim thereby **Causing** the defendant to drive the said motor vehicle into a river. (Emphasis added).

This was a categoric statement that the accident was caused by the plaintiff's failure to fore-warn the defendant of the presence of the bridge when the motor-car approached it.

Then followed para. 6 of the Defence. This read:

> The matter complained of was caused by the negligence of the plaintiff.
>
> **Particulars Of Negligence**
>
> (a) Failing to keep any or any proper look out;
> (b) Failing to warn or indicate to the defendant the existence or state of a bridge;
> (c) Interfering with the defendant's care and control of motor vehicle No. JV 3311.

At the trial however the third man who gave evidence first for the defence and then the defendant himself, both claimed that the only reason why the car went into the river was that just as it had got onto the bridge, the plaintiff went into a panic and pulled the steering wheel down so that the car veered to the left, and went over the bridge into the river. The cause of the accident which was pleaded in defence (i.e., the failure properly to fore-warn the defendant in good time of the existence of the bridge) was not sustained. And in his Judgment the Learned President found as a fact that the pulling of the steering wheel was what caused the accident. In coming to this finding the learned President appeared to have placed undue reliance upon the demeanour of the defendant and the third man. He did not address his mind at all to the fact, that in his Police Report which was made not long after the accident, the third man said absolutely nothing about the accident having been caused by the plaintiff in the manner described. Nor did the Learned President address his mind to the total omission of the defendant to state this fact categorically in the defence. Nor did he take it to the account the effect of the contradiction in the defendant's evidence between what he said in Examination-in-chief where his evidence was that as the car was approaching

the bridge the plaintiff shouted out "bridge" whereas under Cross-examination he said that the car was already on the bridge when the plaintiff shouted out bridge and pulled the steering wheel.

I have been informed by Mr. Kumar of Counsel for the appellant/plaintiff that when the defendant and his witness sought to give evidence of the allegation that the plaintiff had pulled the steering wheel, Counsel for the plaintiff in the Court below objected to its admissibility on the ground that this fact had not been pleaded. However the record does not show any such objection having been made. What it does show is that in the written submission filed by the plaintiff's Counsel, it was submitted that this fact had never been pleaded and that therefore all evidence relating to it should be disregarded.

In his judgment the Learned President has not addressed his mind to this aspect of the case either.

Let me say straight away that where there is a delay of as long as two years from the hearing before a Judgment is given, little reliance can be placed by the Appellate Court on findings of credibility which are said to be based on demeanour. There is judicial precedent for the proposition that in such circumstances the Appellate Court is in as good a position as the Court of First Instance to draw the necessary inferences from the record.

The main thrust of the appellant's argument was based on a series of cases emphasising the role and the importance of pleadings in civil cases.

In effect the submission was that if the defendant was contending that the effective cause of this accident was the act of the plaintiff in pulling down the steering wheel at a critical moment, then he should have said so in the defence. Mr. Tan for the respondent argued that the particulars given under para. 6(c) of the defence covered the evidence in question. Unfortunately this submission was at variance with the categoric words of para. 5 of the defence which alleged that the effective cause of the accident was the failure to fore-warn.

Mr. Tan argued that the omission to state this fact in the Police report made by the third man was not something which should be allowed to prejudice the defendant. As against this however the fact is that the defence was filed two years after the accident and to my mind if this was the case for the defence it should have been clearly stated in the pleadings, instead of being left to the imagination or being bounced at the plaintiff for the first time in cross-examination.

A real difficulty is created for the Court where, instead of objecting in limine to such evidence when it is first sought to be introduced, Counsel for the opposite side not only lets it pass but also cross-examines at length on the matter, thus forcing the Court to decide upon the conflicting versions given by the respective parties and their witnesses.

In *Lau Piang Ngong v. Ang Koon Kau & Anor.* [1984] 2 CLJ (Rep) 137 I fully examined the parameters of the rule that a party is bound by his own pleadings and consequently should not be allowed to make out the case to the contrary at the trial.

The cases cited by Counsel before me now and all the other relevant cases on the point have been fully analysed in my previous decision and no useful purpose will be served in going through them again.

Suffice it to say that there are very close parallels between the present case and the facts in *Waghorn v. George Wimpey & Co. Ltd.* [1969] 1 WLR 1764. In alleging at the trial that the effective cause of the accident was not the failure to fore-warn, but the active intervention

of the plaintiff in taking over the steering wheel of the car, it is my view that there was so radical a departure from the pleaded case as to disentitle the defendant to succeed on that ground.

In so holding, two other points should be noted. The first is that there was absolutely no evidence, contrary to the defence as pleaded, that there was any paramount duty on the part of the plaintiff to fore-warn the defendant because the latter did not know the way. Secondly, the alleged interference with the steering wheel was the crux of the defence. When there is an omission to plead a fact which is the lynch-pin of the defence, and the matter is raised for the first time at the trial a presumption should be invoked that such evidence is inherently incredible unless the omission is satisfactorily explained. There was no such explanation here.

It is therefore the view of this Court that the plaintiff was entitled to succeed.

However, my decision would not been any different even if the evidence of interference was credible and was properly admitted. The defendant was driving his own car. He was solely in control of the vehicle. He says he knew the way. But he sought to dilute the effect of this knowledge by claiming that he was not familiar with the route. If that was so, it is the view of this Court that he should have been extra cautious. Instead the clear evidence is that he was driving too fast in the circumstances because when he came round the corner and was about to get on to the bridge, the manner in which he was driving the vehicle was sufficient to induce panic in the mind of the plaintiff. The primary cause of the agony of the plaintiff therefore was the conduct of the defendant and he should therefore have been found liable. The presumption of *res ipsa loquitor* was not displaced. And the Learned President did not address his mind to this aspect of the case either.

In human terms this was a most unfortunate case. The parties and the third man in the car appeared to have been good friends. Their first misfortune was when they found themselves swindled by Nasir. The second was the accident which followed. The plaintiff appears to have saved the defendant's life, notwithstanding the grievous injuries which he himself had suffered in the accident. He felt entitled to look to the defendant for reimbursement in respect of the residual disability and the expense to which he had been put. Perhaps the defendant felt obliged to defend this action because his insurers would not assist. The souring of their friendly relations has been compounded by the death of the third man in the group. One can only hope that the eight years which have elapsed since the accident occurred has helped the plaintiff and the defendant to put the overview of what life is all about into a better perspective.

This Court however is only concerned with the legal effect of the materials placed before it. The appeal is allowed. The decision of the Learned President is set aside and I order the defendant to pay the plaintiff the sum of RM17,000 by way of general damages and the sum of RM5,752 by way of special damages both of which were agreed in the Court below.

The defendant will also pay the plaintiff the costs of the action at first instance and the costs of this appeal.

Also found at [1987] 1 CLJ 194